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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DARRELL MCGHEE, Defendant and Appellant.	H025498 (Santa Clara County Super. Ct. No. CC244393)

Following a jury trial, appellant was convicted of two counts of assault with intent to commit rape (Pen. Code, § 220), two counts of forcible oral copulation (Pen. Code, § 288a), two counts of residential robbery (Pen. Code, §§ 211-212.5) and two counts of attempting to dissuade a witness (Pen. Code, § 136.1). The jury found appellant not guilty of one count of possession of ammunition by a felon. (Pen. Code, § 12021.) The jury found true various enhancing allegations attached to the sex offenses. (Pen. Code, §§ 12022.3, 667.61, subds. (a) & (e), 460, subd. (a).) The trial court found true allegations that appellant had been convicted of 27 strike offenses and two prior serious felony convictions. (Pen. Code, §§ 667, subds. (b)-(i), 667.5, subd. (b).) The trial court sentenced appellant to a 10-year determinate term to be followed by an indeterminate term of 250 years to life in state prison.

Appellant contends that there was no substantial evidence to support his conviction for the sex offenses. He contends that the trial court erred in failing to give instructions on accomplice testimony and in instructing pursuant to CALJIC No. 2.92 concerning eyewitness identification. Appellant further contends that there was no substantial evidence to support the personal gun use enhancement and that the trial court erred in denying his motion to discharge appointed counsel. We affirm.

EVIDENCE AT TRIAL

D. and M. are a husband and wife who, at the time of theses offenses, had recently moved from Canada to a home in San Jose. Around 4:00 a.m. on March 30, 2002, M. was in bed with D. when she heard a loud noise. She woke D. up, and they saw appellant enter their bedroom through an interior door. Appellant held a flashlight in one hand and what appeared to be a gun in the other hand. Appellant ordered D. and M. to be quiet. D. complied with appellant's commands to get out of bed and to lie face down on the floor.

Appellant asked M. for her purse. She told him it was on the couch in the living room. He told them not to move, left the room, and returned with the purse. Appellant then retrieved D.'s wallet from the second bedroom. Expressing frustration over the small amount of cash in the purse and wallet, appellant questioned M. about jewelry. He examined the contents of her jewelry box, which contained only costume jewelry, and took her diamond engagement ring from the top of the dresser.

At appellant's command D. got back into bed. Appellant told D. and M. "don't call the police" or "[t]here would be big trouble." Appellant closed the bedroom door but D. could tell that appellant was still in the room crouching beside the door. After several minutes D. said, "sir, I see you're still here." After a few more minutes, appellant stood up and ordered M. and D. to get up and stand on either side of the bed.

Using a disposable camera he had taken from their kitchen, appellant photographed D. and M. D. was naked and M. had slipped on a housedress. Appellant ordered M. to take off her housedress. D. testified that appellant then "gave me

instructions, I can't remember how he phrased it, my understanding was at gunpoint to go through the motions of having sex with my wife." D. got on top of M. but, as he testified, "could not do anything except make some motions that suggested a foreplay or whatever." Appellant took some more pictures. M. testified appellant then "grabbed me by the hair and pulled me up and . . . told us to have oral sex."

M. testified that she put D.'s penis in her mouth and that, "While I'm trying to give my husband oral sex, [appellant] grabbed me by the hair, pulled me up and said, I don't know how they did it in Canada, bitch, but this is not how you do it here, and pushed me down again[.]" Appellant pointed the gun at M. Appellant touched his own genital area and told M. if she did not "do it right, he was going to go get his partner" and then M. would "have three men to deal with." Appellant took more pictures. D. suggested, "why don't you tell her what to do rather than telling her she is not doing it right." Appellant told D. to "shut up." He asked M. and D. if they "had a dildo" but they did not respond.

Appellant put the barrel of the gun to D.'s head and said, "you have two minutes to come or you're [going to] get it." Appellant began "motioning as if he was going to take his penis out of his pants." M. said, "why don't you take the computer or the stereo and leave us alone." Appellant again expressed frustration about how little cash was in the house, and asked about their bank accounts. He wanted M. to drive to the bank and withdraw money from the ATM. When he was told M. did not drive, appellant told D. to go instead. D. testified appellant told him, "I had ten minutes to come back or else there would be some sort of trouble." D. testified appellant said "he had this person outside who would be watching me to see where I went to make sure I went where he told me."

D. dressed and left. After determining he was not being followed, he drove to a friend's house and had him call the police. D. went to the bank, made the withdrawal, and returned home.

After D. left to get the money, appellant told M. he was going to go outside to talk to his partner. He returned, took some pictures of M., and told her not to move or call the

police. He left, returned, and left again. By the time D. came back from the bank, appellant was gone.

Coincidentally, officers of the San Jose Police Department had appellant under surveillance beginning March 29, 2002, at about 11:00 p.m. Rather than having one officer follow appellant around all night, the officers used a "rotating type of surveillance." One officer would watch appellant "either in a certain area or for a certain time, and then someone else would take up the surveillance." That night, appellant left his residence and used a flashlight to peer into the surveillance minivan parked near his home. He then got into his car with vanity license plates reading "MS MONEY." He drove around and stopped, at one point taking a bag from the car, disappearing between two buildings, and returning with his clothes changed. Around 4:14 a.m. on March 30, appellant parked and walked off the sidewalk into the darkness between M. and D.'s home and another address. About a half hour later, the officer saw someone leave the residence and drive away. Shortly thereafter appellant reappeared on the sidewalk. He drove around, parking and changing his clothes again, eventually arriving home around 6:00 a.m. The police officers made contact with appellant and arrested him. D. and M. identified him in a field show-up. Police found a BB gun in appellant's car and, in the bedroom of appellant's house, ammunition and several items belonging to M. They did not find M.'s diamond engagement ring.

SUBSTANTIAL EVIDENCE OF COUNTS 1, 2, 3, AND 4

Penal Code section 31, which describes one's criminal liability as a principal, states, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit

any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

The jury was instructed pursuant to CALJIC No. 3.04 that, "a person who by threat, menace, command, or coercion compels another to commit any crime is guilty of that crime." The prosecutor referred to this instruction in closing argument saying, "Usually this isn't the issue, it's more clear-cut. A person will walk into a bank with a gun, obviously that person is committing an armed robbery. But in this case where the defendant had essentially a third person commit the act, if you want to look at it as using D[.] as a conduit committing the act against M[.] and using M[.] as a conduit with D[.], you need to take into account the principle if they'd done it because of a threat by him or force or menace, he's guilty of that crime even though he isn't the one who is physically assaulting with the intent to commit rape or orally copulating or being orally copulated, it doesn't matter, the bottom line, he forced that activity. [¶] If that activity was not willful or consensual, then he's just as guilty of those crimes."

Appellant argues that the "fatal problem" in this case is "that this principle could not be used to convict appellant of the crimes charged in counts one through four, since his liability under this theory is purely vicarious and the conduits themselves did not commit any crime." He asserts Penal Code section 31 applies "only where the defendant causes someone else to commit a 'crime,' that a crime consists of both an act (*actus reus*) and an intent (*mens rea*), and that therefore the theory of liability can only apply to general intent crimes. . . . Use of the term 'compel' signifies that the person who is caused to commit the *actus reus* does so against his or her will, and therefore that the person so compelled does not have the specific intent to commit a crime. And the use of the term 'crime' makes it clear that there is no liability for someone to compel a conduit to merely commit an act which is not criminal in itself."

Respondent argues that appellant is a principal under the "innocent conduit" theory of liability asserting, "It is the defendant's state of mind, not the victim's, which

determines liability." Respondent notes that California has codified the "innocent conduit" theory of liability in Penal Codes section 31. As stated in *People v. Austin* (1980) 111 Cal.App.3d 110, 114," '[A]t common law one who caused a crime to be committed by an innocent agent was deemed guilty of the crime as a principal. . . .' (*Workman v. State* (1939) 216 Ind. 68 . . . .) This rule has been applied to burglary, *Moore v. State* (1977) 267 Ind. 270 . . . ; theft, *People v. Taylor* (1973) 30 Cal.App.3d 117, 121-122 . . . ; forgery, *People v. Jack* (1965) 233 Cal.App.2d 446, 456-457 . . . ; murder, *State v. Benton* (1970) 276 N.C. 641 . . . ; and *Fritz v. State* (1964) 25 Wis.2d 91 . . . . The common law rule is contained in California Penal Code section 31."

Respondent cites *People v. Pitts* (1990) 223 Cal.App.3d 606. In *Pitts*, the Court of Appeal held that a defendant cannot be convicted of aiding and abetting where there is insufficient evidence to establish the intent of the perpetrator to commit the crime. A defendant "is *not* an aider and abetter (hence he or she cannot be convicted of violating section 288 [lewd act with a child] on an aiding and abetting theory) *unless* one of the children has the requisite specific intent under section 288, i.e., unless one of the children is violating section 288. [Citation.] If one of the children is not violating section 288, there is nothing for 'A' to aid and abet. 'A's' liability is direct, not vicarious." (*Id*. at p. 875.) The court in *Pitts* noted that in the absence of evidence of the criminal intent of the perpetrator, the defendant may only be found guilty on a "constructive" or "innocent agent" theory where the jury has been expressly instructed the defendant's guilt on such theories is "as a principal." (*Pitts, supra,* 223 Cal. App. 3d at p. 875.*)*

Respondent maintains that the prosecutor expressly relied on the innocent conduit theory of liability to support the claim that appellant was guilty as a principal of the sex offense in counts one through four. Appellant criticizes respondent's argument, interpreting it as meaning "that the liability provided for in Penal Code section 31 involves some weird type of hybrid liability, in which the defendant provides the mental state and the conduit provides the requisite act." Appellant argues, "[t]his claim not only

does violence to Penal Code section 31, which provides that it is the conduit who commits the 'crime,' without parsing the 'crime' into severable parts, but also to Penal Code section 20, which requires 'a union, or joint operation of act and intent . . . .' "

We disagree. Appellant's interpretation of Penal Code section 31 is far too restrictive. For purposes of Penal Code section 31, the "crime" is "the act constituting the offense," that is, the wrong to which the victim was subjected. For example, when a person is compelled to orally copulate another against the victim's will, the act constituting the offense of the crime of forcible oral copulation has been committed. When someone is permanently deprived of his or her property through a forcible taking, the crime of robbery has been committed. Regardless of whether anyone is apprehended for, charged with, or convicted of committing those crimes, the crimes have still been committed. Penal Code section 31 describes how we assess an individual's liability for crimes. As the jury here was instructed, "[a] person who, by threat, menace, command, or coercion, compels another to commit any crime is guilty of that crime." The jury so instructed determines, for example, whether a forcible taking of personal property occurred and whether the defendant, as a principal, compelled another, who thus became his agent, to commit that forcible taking of property. By compelling M. at gunpoint to commit the *actus reas* of forcible oral copulation, with the intent to cause D. to engage in oral copulation against his will, appellant is liable as a principal for the crime of forcible oral copulation. The conduct of compelling the agent to commit the *actus reas*, the act constituting the offense, while *concurrently* harboring the appropriate *mens rea* satisfies the requirement of Penal Code section 20 for the *concurrence* of conduct and intent. Because appellant compelled D. and M. to commit the offenses charged in counts one through four, appellant is, under Penal Code section 31, liable for them.

Evidence of the Intent to Use Force

Appellant contends that there was no evidence that either D. or M. had the intent to use, or used force or threat of force necessary to completion of these offenses. He

argues, "Since neither D[.] or M[.] used force, compulsion, duress, menace or fear to compel the other to engage in such any sex act, neither committed an assault with intent to rape under [Penal Code] section 220 or forcible oral copulation under [Penal Code] section 288a. Since neither conduit committed either offense, and since appellant's liability is purely derivative and therefore co-extensive with 'crime[s]' (§ 31) committed by others, there was no evidence sufficient to sustain his convictions [in] counts one, two, three and four."

Both M. and D. committed the acts charged. These acts were committed against the will of the other due to appellant's threats of force with the gun. Thus, there is sufficient evidence of appellant's use of force to support appellant's liability for these offenses.

D. as Victim of Assault with Intent to Commit Rape

Appellant was convicted of two counts of assault with intent to commit rape, with M. as the named victim in count one and D. as the named victim in count two. Appellant contends that, as to count two, alleging assault with intent to commit rape with D. as the named victim, there is no evidence that appellant assaulted D. for the specific purpose of raping him. He argues, "While there was evidence that appellant intended to cause D[.] to have or simulate sex with M[.], that evidence was relevant, if at all, only to count three, in which M[.] was named as the alleged victim. The evidence was not relevant to count two, because there is no evidence that appellant intended either to personally rape or to cause anyone else to rape D[.]."

To support a conviction for assault with intent to commit rape, the prosecution must prove the assault and an intent on the part of the defendant to use whatever force is required to complete the sexual act against the will of the victim. (*People v. Cortez* (1970) 13 Cal.App.3d 317, 326.) The evidence showed that appellant intended for D. to have sexual intercourse with M. and thus, necessarily, for M. to have sexual intercourse with D. The evidence supports the conclusion that both were attempting this intercourse

because appellant was threatening them and pointing the gun at them. Thus, the evidence demonstrates that appellant intended to cause D. to rape M., but also to cause M. to rape D., that is, for M. to engage in an act of sexual intercourse accomplished against D.'s will by fear of immediate and unlawful bodily injury. Substantial evidence supports appellant's conviction in count two for assault with intent to commit rape with D. as the named victim.

Two Victims of One Act of Oral Copulation

Appellant contends, "M[.] and D[.] could not be victims of the alleged forcible act of oral copulation because both were criminal agents in the commission of the same act under the prosecution's theory of the case." He argues, "Under the prosecution's 'conduit' theory, appellant used M[.] as the criminal agent or conduit to copulate D[.], and appellant used D[.] as the criminal agen[t] or conduit to copulate M[.]. Since each was acting as appellant's agent to commit a crime for which neither had a legal defense, there is no evidence to support the convictions on counts three and four." Appellant states he "has not been able to find a single case, or any other authority, which recognizes the legal possibility of two criminal agents or conduits both being considered victims as the result of a single, joint sex act." Appellant argues that the fact that the oral copulation was carried out under compulsion does not insulate M. and D. from criminal liability. Appellant cites Penal Code section 26, subdivision 6, which provides: "All persons are capable of committing crimes except those . . . who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." Appellant argues that neither M. nor D. testified that they performed any act under such an actual belief.

Whether there would be sufficient evidence to establish the legal excuse of duress in any prosecution of M. or D. for any act committed in this case is simply not an issue here. The evidence shows that M. and D. committed the unlawful acts against each other

at appellant's gunpoint commands. That M. could have an excuse or defense for her conduct towards D. does not mean that M. was not a victim of the crime perpetrated on her, or that appellant is not liable for both of these offenses.[1]

ACCOMPLICE TESTIMONY INSTRUCTIONS

Appellant contends that he "was deprived of his Fourteenth Amendment right to due process of law, and his Sixth Amendment right to jury trial by the failure of the trial court to instruct the jury on the legal principles governing jury assessment of accomplice testimony." He argues, "The trial court erred by failing to instruct the jury on principles of accomplice testimony under which it could find that M[.] and D[.] were accomplices whose testimony required corroboration and should be viewed with distrust."

Penal Code section 1111 provides, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

In *People v. Guiuan* (1998) 18 Cal.4th 558, our Supreme Court said, "the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.' " (*Id*.

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[1] Because we reject appellant's arguments concerning the insufficiency of the evidence for conviction as to counts one, two, three and four, we reject his argument that these convictions violated his right to due process.

at p. 569.) The corroboration rule seeks to ensure trustworthiness given that an accomplice might testify in hopes of receiving immunity or other prosecutorial favor. (*Id*. at pp. 567-568.)

Respondent argues that M. and D. were not accomplices and thus no accomplice testimony instructions were required. Respondent's view is that, because M. and D. were "innocent conduits" they could not be prosecuted for these offenses, and thus, were not accomplices. Although M. and D. were participants in these crimes and thus theoretically liable for prosecution, however unlikely that may be under these horrible circumstances, any error in failing to give accomplice instructions was harmless. In *People v. Box* (2000) 23 Cal.4th 1153 our Supreme Court said that failure to give accomplice instructions is not reversible if it is not reasonably probable the jury would have reached a result more favorable to the defendant had the instructions been given. (*Id.* at p. 1209.) Failure to instruct on accomplice evidence is harmless if there is sufficient corroborating evidence in the record. Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. The evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

Here, there was abundant evidence to corroborate M.'s testimony, to corroborate D.'s testimony, to incriminate appellant, and to connect him to these offenses. The police surveillance places appellant arriving at and leaving the scene of these crimes at the time of their commission, although appellant told the police he did not remember where he had been that night. There are photographs of the entryway to M. and D.'s family room showing the doorjamb split where the dead bolt would be secured and flower pots knocked over. Photographs developed from the disposable camera show M. and D., separately, standing up against a white wall. Both look tousled and very frightened with

D. appearing unclothed and M. wearing a housedress. Another of these photographs depicts "two people engaged in a sexual act." The police saw D. leave the residence and drive away and saw appellant appear on the sidewalk a few minutes later. When appellant left D. and M.'s home, he stopped and changed his clothes and took the freeway home when the quickest route would have been to take surface streets. Appellant had possession of various items belonging to M. at his home when he was arrested. The police found appellant in possession of the BB gun and a flashlight. This evidence provides sufficient corroboration of D.'s testimony and M.'s testimony, tending to connect appellant with the crimes in such a way as to satisfy the jury that M. and D. were telling the truth. [2]

Appellant contends that had the jury been advised it should view D's testimony and M.'s testimony with distrust and their accounts with care and caution, "it would certainly have been more likely to have rejected their accounts, or at least have had a reasonable doubt whether they were true." Our review of the record convinces us that the giving of these instructions would not have caused the jury to reject M.'s testimony or D.'s testimony. Any error in failing to instruct on the law of accomplices was harmless under any of appellant's suggested standards of review.

GUN ENHANCEMENT

Appellant contends, "There is no substantial evidence to support the personal gun use, one-strike findings." The jury found true enhancement allegations attached to the forcible oral copulation counts that appellant "personally used a dangerous and deadly weapon in violation of Penal Code Section 12022.3." These findings subjected appellant to enhanced sentencing under the One Strike Law. The weapon used in this case was a Daisy BB-gun, which was seized from appellant's car. Appellant argues the evidence is

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[2] We observe that the idea that either M. or D. acted as appellant's accomplice would be inconsistent with the misidentification defense presented at trial.

insufficient that this gun was a dangerous and deadly weapon within the meaning of Penal Code section 12022.3 because, "There was no evidence that appellant had possession of, or access to, any BB's or other material that could have been fired from the gun. There was no evidence that it was capable, even had it been loaded with BB's, of firing a round capable of breaking skin or inflicting injury."

Appellant contrasts his case to *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, and compares it to *People v. Reid* (1982) 133 Cal.App.3d 354. In *People v. Lochtefeld, supra,* 77 Cal.App.4th 533, the defendant challenged his conviction for assault with a deadly weapon on a peace officer in violation of Penal Code section 245, subdivision (c). The issue was whether a pellet gun could qualify as a deadly weapon. A related question was whether a BB gun is a dangerous weapon capable of inflicting serious bodily injury. The appellate court detailed certain conclusions the trial court drew from the testimony of an expert witness. Some weapons "fire small round pellets, also known as 'BB's,' or larger-diameter pellets . . . ." (*People v. Lochtefeld, supra,* at p. 535, fn. 2.) "Pellet guns range from children's BB guns firing BB's under 200 feet per second, which are unlikely to cause injury, to 'adult' pellet guns that can expel projectiles over 650 feet per second, which can be lethal." (*Id.* at p. 537.) "[A] velocity of 300 to 360 feet per second would go through human skin and penetrate muscle tissue to a depth of about one inch and a half. Pellet velocities above 250 feet per second would penetrate an eyeball." (*Ibid.*)

In *Reid,* the court held that a toy gun cannot be considered to be a deadly or dangerous weapon under Penal Code section 12022, subdivision (b), unless it appears that it is capable of being used in a dangerous or deadly manner and it may be inferred from evidence that the user intended to use it as a weapon should the circumstances require. Because the court found no substantial evidence proving that the defendant intended to use the toy gun as a club, it struck the Penal Code section 12022, subdivision (b), enhancement.

Appellant argues, "Because the prosecution failed to prove that the Daisy BB-gun could expel a BB at sufficient speed to cause a serious injury, or to prove that appellant intended to use it as a bludgeon, the evidence is insufficient to support the section 12022.3 enhancements, and therefore to support the One Strike sentencing based on them."

We do not view *Lochtefeld* as establishing a minimal evidentiary threshold for proof of a weapon's capabilities. In fact, evidence of the weapon's capabilities took on greater significance in that case, because the statute at issue applied only if the defendant used a deadly weapon, as opposed to a dangerous or deadly weapon, and the court also found it necessary to consider the weapon's present ability to injure. We have examined the gun itself and considered its size and weight. The officer who seized the gun testified, "It's a real [BB] gun. I mean I don't know the condition of it, but it will shoot a [BB]." Appellant threatened to shoot M. and D. He grabbed M. by the hair and pushed her around. In addition to pointing the gun at them, appellant placed the barrel of the gun so that it was touching D.'s head, and threatened that D. was "gonna [*sic*] get it." The evidence of appellant's actions and statements indicate that he could either shoot the BB gun at D.'s head, in very close proximity to D.'s eye, or hit D. in the face with the gun. Sufficient evidence supports the imposition of the enhancement, and appellant was not deprived of due process.

CALJIC 2.92 / THE CERTAINTY FACTOR

Appellant contends, "[he] was prejudiced by the rendition of CALJIC (6th Ed.) No. 2.92 because the instruction erroneously suggests to jurors that they may consider a witness's confidence in his or her identification, as expressed at trial, to be a reliable indication of its accuracy." CALJIC No. 2.92 provides in relevant part: "In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including but not limited to, any of the

following: . . . [¶] The extent to which the witness is either certain or uncertain of the identification." Appellant argues that this "certainty factor" is based on an erroneous interpretation of *Neil v. Biggers* (1972) 409 U.S. 188, in which the United States Supreme Court enumerated factors which should be considered by the trial judge in assessing whether a field show-up was sufficiently reliable so that evidence of it could be presented to the jury without violating due process. (409 U.S. at pp. 199-200.)

Appellant argues that a witness's certainty is not a "valid factor" for assessing the accuracy of eyewitness identification testimony. In support of his argument, appellant cites numerous psychological studies discussing the lack of a correlation between the witness's certainty and the accuracy of the identification. Appellant claims the giving of this instruction deprived him of due process.[3]

The California Supreme Court has previously approved of CALJIC No. 2.92, stating the instruction "will usually provide sufficient guidance on eyewitness identification factors." (*People v. Wright* (1988) 45 Cal.3d 1126, 1141.) The dissent in *Wright* stated that the inclusion of the certainty factor was misleading because it reinforced a common perception that the more certain an eyewitness is of his identification, the more likely the identification is correct. (*Id.* at p. 1159, dis. opn. of Mosk, J.) The majority rejected the dissent's suggestion that the inclusion of this factor, without further explanation, rendered the instruction deficient. (*Id.* at pp. 1141-1143.) The court concluded that CALJIC No. 2.92 "effectively inform[s] the jury [of the appropriate factors] without improperly invading the domain of either jury or expert witness" and that the effect of any particular such factor "is best left to argument by

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[3] Appellant did not object to CALJIC No. 2.92 at trial, nor are any of the studies he cites part of the record on appeal. Appellant asserts that raising the objection at trial was not necessary because the instruction affected his substantial rights. Issues of waiver aside, appellant's claim fails on its merits.

counsel, cross-examination of the eyewitnesses, and expert testimony where appropriate." (*Id.* at p. 1143.)

Similarly, in *People v. Johnson* (1992) 3 Cal.4th 1183, 1230-1232, the court rejected the argument that the certainty factor should have been omitted from the instruction because there was uncontradicted expert testimony that a witness's certainty does not positively correlate with the identification's accuracy.

Appellant argues that neither *Wright* nor *Johnson* address his contention that CALJIC No. 2.92 is in error because witness certainty is not a relevant factor in assessing accuracy. He claims "the average juror would understand the instruction to mean that a witness's confidence in his or her eyewitness identification is a legitimate indication of its accuracy . . . . [T]he instruction creates an improper permissive inference of witness accuracy based on a witness' confidence." The *Wright* court held that "a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence. [¶] The instruction should *not* take a position as to the *impact* of each of the psychological factors listed." (45 Cal.3d at p. 1141, emphasis in original.) The court expressly approved CALJIC No. 2.92, commenting that this instruction, with appropriate modifications to take into account the evidence presented at trial, will usually provide sufficient guidance on eyewitness identification factors. (*Ibid.*)

We disagree with appellant's premise concerning the average juror's interpretation of the instruction as establishing a confidence-to-accuracy correlation. The language of CALJIC No. 2.92 does not create such a correlation. For example, consider a juror evaluating the weight to give the testimony of two witnesses. The first is a witness who caught a fleeting glimpse of a suspect yet testified that he was absolutely positive of his identification. The second is a witness who had ample opportunity to observe a suspect yet who testified to being very uncertain of his identification. A juror might give little

weight to the testimony of the witness in the first case, because the witness was too confident. Nothing in the language of CALJIC No. 2.92 would prevent the juror from doing so, or from considering that the testimony of the second witness was needlessly tentative. In both cases, the certainty of the witness would be a relevant factor in evaluating the witnesses' testimony, but in neither is certainty necessarily a direct correlator of accuracy.

Appellant relies on *Manson v. Brathwaite* (1977) 432 U.S. 98, for the proposition that his due process rights were violated because use of the certainty factor allowed the jury to consider unreliable evidence. But the United States Supreme Court listed the witness's certainty when first identifying the defendant as a factor to be considered in determining the constitutional reliability of tainted identification evidence admitted at trial. (*Id.* at p. 114.) Thus, it is improbable that the court would find CALJIC No. 2.92 violates a defendant's due process rights because it includes the "certainty" factor among 11 other factors to be considered in evaluating the reliability of a witness's identification.

MOTION TO DISCHARGE APOINTED COUNSEL

Appellant contends, "The trial court deprived appellant of his Sixth Amendment right to effective assistance of counsel when it failed to conduct an adequate inquiry, and failed to appoint independent counsel to assist appellant in presenting his pretrial motion to substitute attorneys."

"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." (*People v. Crandell* (1988) 46 Cal.3d 833, 854; *People v. Hart* (1999) 20 Cal.4th 546, 603.)

The Supreme Court "established in [*People v.*] *Marsden* [(1970) 2 Cal.3d 118] that the trial court must give the defendant the opportunity to explain the reasons for desiring a new attorney. (*Marsden, supra*, 2 Cal.3d at pp. 123-125.) '[T]he trial court cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys.' (*Id*. at p. 123.) Accordingly, 'When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.]" (*People v. Smith* (1993) 6 Cal.4th 684, 690-691; *People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

On September 17, 2002, the trial court ordered a panel of 95 jurors to arrive the next morning. When the court was called to order to begin motions in limine, the court was told that appellant wished to make a *Marsden* motion. The court invited appellant to explain the basis for his motion. Appellant said defense counsel had visited him "approximately three times." Appellant complained that defense counsel had not given him copies of the police surveillance report until that day. Appellant said defense counsel "informed me that she really doesn't have a defense to follow behind whatever decision is made after today . . . ."

Counsel affirmed that she had visited appellant three times. Counsel said, "[E]ach time that we have discussed the case, I've asked him if he's got an alibi defense, if he's got anything that I should follow-up on or look into, and basically I haven't been provided with any information which I could follow up with, no names, addresses, contact people, he was provided with the police report." Counsel explained that she thought she had given appellant a copy of the surveillance report, but when appellant told her he did not have it, she gave him a copy that day. She explained that the surveillance evidence was

not presented at the preliminary examination. Counsel said, "Mr. McGhee may be upset that I don't have a defense to present, but as I've informed him, I can't create a defense, that isn't my role, my role is basically to take what he can offer me and try to formulate a defense based on the facts that I've been given." The court asked appellant if he had anything else to say, and he said, "No. Basically that's about it. Just that I only can tell her the truth in reference to any alibi or witnesses that's unknown, I couldn't give that information out, so therefore, I'm left with the detail that is in front of me."

Appellant indicated he might wish to retain private counsel, and the trial court explained that that could not be done "on the eve of trial[.]" The trial court found counsel was providing adequate representation and denied appellant's motion. Appellant now argues that the trial court failed to conduct an adequate inquiry into the extent of his communication with counsel and the extent of the investigation in his case.

The trial court provided appellant with a sufficient opportunity to explain the reasons for his dissatisfaction. Nothing in his remarks or defense counsel's response warranted further inquiry. Counsel explained that in the three visits she attempted to obtain information to support a defense, but that appellant had nothing to say that would trigger further investigation. This lack of information from appellant is not the equivalent of a lack of communication between counsel and appellant. As for counsel's "passive and defeatist attitude" of which appellant complains, we consider her comments to reflect a professional's appraisal of the state of the evidence in light of what she knew of the prosecution's case and appellant's inability or reluctance to provide any information to support a defense. In sum, the record is clear that the trial court provided appellant with ample opportunity to voice his concerns, and upon considering those concerns and counsel's response, reasonably found them to be insufficient to warrant relieving trial counsel. We find no basis for concluding that the trial court either failed to conduct a proper *Marsden* inquiry or abused its discretion in declining to substitute counsel.

Appellant contends, "the trial court erred by failing to appoint counsel to represent appellant for purposes of the substitution motion since it was a critical portion of the trial and appellant was unrepresented in light of [defense counsel's] adversarial position and inherent conflict of interest." In the trial court, there was no suggestion that such an appointment might be appropriate. Appellant acknowledges, "the California Supreme Court held that a defendant had no right to appointment of counsel for purposes of making the motion. (*People v. Hines* (1997) 15 Cal.4th 997, 1024-1025 . . . .)" Appellant attempts to distinguish *Hines* because "[i]t does not appear that the *Hines* Court was faced with a case in which trial counsel took an adversarial position regarding the motion, however, or that the California Supreme Court considered or ruled on a claim that such an approach by trial counsel created a conflict of interest leaving appellant unrepresented during a critical stage of the proceedings."

We disagree with appellant's characterization of the record as demonstrating that his interests and trial counsel's were adversarial to each other. "Although a defendant may seek and obtain (upon a proper showing) substitute counsel at any stage of the proceeding in trial court [citation], a defendant is not entitled to simultaneous representation by two attorneys, one of whom is challenging the other's competence (*People v. Hines, supra*, 15 Cal.4th at p. 1024)." (*People v. Barnett, supra,* 17 Cal.4th at p. 1112.) Under the circumstances presented here, there was no conflict of interest requiring appointment of counsel for purposes of making appellant's motion to discharge appointed counsel.

DISPOSITION

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

RUSHING, P.J., Concurring and Dissenting

I agree with the conclusion of the majority as well as the reasoning and thoughtful presentation. However, the 250-year sentence challenges good sense. All we, as courts, have ever had is the respect of the citizenry. When we erode that respect, we diminish our importance as an equal branch of government. Therefore I agree with Justice Mosk's dissent in *People v. Hicks* (1993) 6 Cal.4th 794, 797 ["A sentence like the one imposed here, that cannot possibly be completed in the defendant's lifetime, makes a mockery of the law and amounts to cruel or unusual punishment"].

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RUSHING, P.J.